BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
LARRY D. AND MARJORIE M. CRANDALL)

Appearances:

For Appellants: Minoru Higa
Certified Public Accountant

For Respondent: James T. Philbin
Supervising Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Larry D. and Marjorie M. Crandall against a proposed assessment. of additional personal income tax in the amount of $2,520.21 for the year 1974.

The issue presented by this appeal is whether appellants complied with the provisions of either section 18091 or section 18093(e) of the Revenue and Taxation Code entitling them to nonrecognition of any gain realized on the sale of their California residence.

In 1974, appellants sold their residence in La Jolla, California. The close of escrow took place on July 29, 1974, and funds were disbursed on August 1, 1974. The sale price was $160,000, and appellants realized a gain of $53,286.02. On May 14, 1975, appellants entered into an agreement to purchase a new residence in Philadelphia for $110,000. The agreement specified that settlement would take place on or before August 1, 1975, and possession and the deed would be delivered at settlement. The seller was unable to provide clear title to the property by August 1, 1975, and the title to the property did not pass to appellants until August 28, 1975. Consequently, appellants did not occupy their new residence until that date or shortly thereafter.

On their 1974 California return, appellants treated that portion of the gain from the sale of their California residence attributable to residential use as nonrecognizable. Respondent determined that appellants had not satisifed California's statutory requirements for deferring recognition of gain realized on the sale of a residence because they did not purchase and occupy the new residence within one year from the date of the sale of the old residence. Accordingly, appellants' tax was recomputed by recognizing the gain. on the California residence as gain from the sale of a capital asset held for more than five years.

Appellants contend that they come within the nonrecognition provisions of Revenue and Taxation Code section 18091, as it read prior to revision in 1975, because they intended and diligently attempted to meet the statutory requirements, and the delay was entirely caused by the seller. In any event, appellants believe they had 18 months to replace their residence in view of section 18093(e), as it read during the appeal year, which relates to the situation where construction.of the new residence is "commenced by the taxpayer." Respondent points out that appellants have not proven that construction was commenced by appellants as required by section 18093(e).

Revenue and Taxation Code section 18091, before revision in 1975, provided:

> If property (hereinafter in this article called "old residence") used by the taxpayer as his principal residence is sold by him after December 31, 1952, and, within a period beginning one year prior to the date of such sale and ending one year after such date, property (hereinafter in this article called "new residence") is purchased and used by the taxpayer as his principal residence, gain (if any) from such sale shall be recognized only to the extent that the taxpayer's adjusted sales price (as defined in Section 18092) of the old residence exceeds the taxpayer's cost of purchasing the new residence.

Section 18091 is, and was during the appeal year, essentially the same as Internal Revenue Code section 1034(a). Therefore, construction of the federal statute is very persuasive in interpreting the California section. (Holmes v. McColgan, 17 Cal. 2d 426 [110 P.2d 428] (1941).)

Section 18091 has two requirements, both of which must be met, to qualify for nonrecognition of gain. First, the new residence must be "purchased" within one year after the sale of the old residence. A sale or purchase does not occur, for tax purposes, until either title, possession or the benefits and burdens of ownership (e.g., obligation for taxes on the property) have passed. (Commissioner v. Baertschi, 412 F.2d 494, 498 (6th Cir. 1969); Dettmers v. Commissioner, 430 F.2d 1019, 1023 (6th Cir. 1970).) Appellants received none of these until at least August 28, 1975, more than one year after the sale of their old residence.

Even if appellants had purchased their new residence within the one-year period, they did not meet the second requirement of section 18091, that they use the new residence within one year. The case law clearly holds that actual occupancy is necessary to meet this requirement. (United States v. Sheahan, 323 F.2d 383, 386 (5th Cir. 1963); John F. Bayley, 35 T.C. 288, 295 (1960); Nelson C. Elam, 58 T.C. 238, 240 (1972), affd. per curiam, 477 F.2d 1333 (6th Cir. 1973).) Neither the taxpayer's intent nor the reasons for the taxpayer's inability to occupy the new residence are relevant in determining whether occupancy has occurred within the requisite time. (Sheahan, supra, at 385; Bayley, supra, at 297; Joseph T. Gelinas, ¶76,102 P-H Memo. T.C. (1976).) Therefore, appellants, who neither purchased

nor occupied their new residence until after one year from the sale of their old residence, are not entitled to nonrecognition of gain under section 18091.

Revenue and Taxation Code section 18093(e), before its revision in 1975, read as follows:

> In the case of a new residence the construction of which was commenced by the taxpayer before the expiration of one year after the date of the sale of the old residence, the period specified in Section 18091, and the one year referred to in subsection (d) of this section, shall be treated as including a period of 18 months beginning with the date of the sale of the old residence. (Emphasis added.)

Appellants contend they fall within the terms of this section because their new residence was a new construction and they were its first occupants.

This section is substantially the same as Internal Revenue Code section 1034(c)(5). The legislative history of the federal section indicates clearly that it is to apply to a new residence built by the taxpayer, rather than one purchased by the taxpayer. (See S. Rep. No. 781, 82d Cong., 1st Sess., p. 35 (1951) [1951 U.S. Code Cong. & Ad. News 1969]; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 109 (1954) [1954 U.S. Code Cong. & Ad. News 4621]; H. R. No. 1337, 83d Cong., 2d Sess., p. 79 [1954 U.S. Code Cong. & Ad. News 4017]; see also Nelson C. Elam, supra, at 240.) The Internal Revenue Service has ruled that the provisions of Internal Revenue Code section 1034(c)(5) do not apply to the purchase of a partially-constructed new residence from a builder who then completes the construction (Rev. Rul. 57-234, 1957-I Cum. Bull. 263) nor to the purchase of a condominium unit in a condominium project to be constructed. (Rev. Rul. 76-216, 1976-I Cum. Bull. 220.) These interpretations comport with the plain meaning of section 18093(e), and we find, therefore, that appellants are not entitled to use the nonrecognition of gain provisions of that section.

At the oral hearing before this Board, appellant Larry D. Crandall asserted that he was divorced from his wife, appellant Marjorie M. Crandall, that she had reinvested her share of the proceeds from the sale of their California residence in a new residence within

the time limits of section 18091, and that one-half of the gain was therefore entitled to nonrecognition treatment. However, appellant has produced no evidence regarding either the divorce or alleged reinvestment, and, under the circumstances, no adjustment is warranted.

For the reasons stated above, we sustain respondent's action.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Larry D. and Marjorie M. Crandall against a proposed assessment of additional personal income tax in the amount of $2,520.21 for the year 197'4, be and the same is hereby sustained.

Done at Sacramento, California, this 1st day of August , 1980, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

- - - - - _____ - -, Member